Federal/State Antitrust Suit Against Blue Cross Blue Shield of Michigan Can Proceed

AntitrustConnect Blog
August 19, 2011

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Please refer to this post as: Jeffrey May, 'Federal/State Antitrust Suit Against Blue Cross Blue Shield of Michigan Can Proceed', AntitrustConnect Blog, August 19 2011,
http://antitrustconnect.com/2011/08/19/federalstate-antitrust-suit-against-blue-cross-blue-shield-of-michigan-can-proceed/

Last week, the federal district court in Detroit denied Blue Cross Blue Shield of Michigan's motion to dismiss a federal/state antitrust action challenging the health insurer's use of most favored nation (MFN) clauses in its provider agreements with various hospitals. The suit, filed in October 2010, alleges that the MFN clauses unreasonably restrained trade in violation of Sec.1 of the Sherman Act and Sec. 2 of the Michigan Antitrust Reform Act. (See blog post of October 19, 2010.)

In its motion to dismiss, Blue Cross argued that the complaint failed to plausibly allege relevant markets, market power, anticompetitive effects arising from the use of MFNs in any relevant market, and facts supporting a viable legal theory of harm. Blue Cross also contended that its conduct was exempt from the Michigan Antitrust Reform Act and that it was entitled to immunity from the federal claims under the state action doctrine. In addition, the health insurer asked the court to abstain from hearing the case based on a purported state remedy, such as review by the state insurance commissioner of the MFN clauses.

Plausible Allegations

The Justice Department andMichigan attorney general sufficiently alleged plausible markets, anticompetitive effects, and a legal theory of harm, the court ruled.

According to the court, the government alleged two product markets affected by the MFN clauses: commercial group health insurance and commercial individual health insurance. At the pleading stage, there was no requirement that a market-by-market analysis of the insurance companies involved and their products and services be alleged in the complaint, as Blue Cross had argued.

In addition, the government plausibly alleged sufficient facts to establish 17 specific geographic markets. The complaint stated a claim that consumers demand access to local providers and, therefore, the health insurance markets were local, despite Blue Cross' argument that that health insurance markets were "national."

The challenged MFNs were alleged to have negatively affected competition in the health insurance markets throughoutMichigan. The government alleged that the MFN clauses raised competitors' costs, likely increasing premiums, and directly increased costs to self-insured employers. The complaint set forth specific examples. Moreover, the government plausibly alleged facts that other insurers had been excluded or may have been excluded or that the alleged conduct caused foreclosure.

Michigan Antitrust Reform Act Exemption

The court rejected Blue Cross' argument that its use of MFN clauses was exempt from the Michigan Antitrust Reform Act. A provision of the statute (M.C.L. § 445.774(6)) stated that a transaction or the conduct of a health insurer was exempt from the state antitrust law "when the transaction or conduct is to reduce the cost of health care and is permitted by the commissioner." However, the complaint plausibly alleged that the challenged MFNs did not reduce the cost of health care. Moreover, other exemptions under the Michigan Antitrust Reform Act were inapplicable because the use of MFNs to prevent competition was not authorized by either federal or state law.

State Action Immunity

The court applied the two-part test to determine whether state action immunity doctrine required dismissal of the Sherman Act claims. At issue were : (1) whether the challenged restraint had been clearly articulated and affirmatively expressed as state policy; and (2) whether the policy was actively supervised by the state.

The statutes governing Blue Cross' actions neither clearly articulated nor

affirmatively expressed the act sought to be restrained–using MFNs to deter competition with other insurers. Blue Cross pointed to the state's Nonprofit Health Care Corporation Reform Act (NHCCRA) for support. However, the main goal of the NHCCRA was to assure access by the people to health care services. The statute was not intended to permit Blue Cross to enter into contracts with providers that discouraged competition with other insurers, the court explained. Although the NHCCRA allowed Blue Cross to include reimbursement arrangements that included financial incentives and disincentives, such arrangements could not result in cost shifting to other health care purchasers, in the court's view. The complaint alleged sufficiently that the MFNs at issue prevent other insurers from competing with Blue Cross.

The court noted that the state actively supervised the policy of ensuring accessibility to health care services at a fair and reasonable price. However, Blue Cross was unable to point to any provision of the NHCCRA that allowed MFNs with hospital providers that prevented other insurers from competing with Blue Cross.

The court also rejected Blue Cross' argument that it was a "quasi-public entity." Blue Cross was a private entity, not a state actor.

Abstention

The court rejected Blue Cross' argument under *Burford v. Sun Oil Co.* , 319 U.S. 315 (1943) that it should abstain because there was an adequate state remedy. There was no available review of the MFN clauses by the state insurance commissioner under the Nonprofit Health Care Corporation Reform Act, according to the court. Blue Cross had not shown that the insurance commissioner, in fact, reviewed the MFN clauses at issue.

Blue Cross has already filed a notice of interlocutory appeal. The filing came after the court indicated in June that it would deny Blue Cross' motion to dismiss and later issue a written opinion explaining its decision.

The text of the August 12, 2011, decision in *United Statesand State ofMichiganv. Blue Cross Blue Shield of Michigan*, Case No. 10-14155, will appear at **CCH 2011-2 Trade Cases ¶77,568**.