

Blue Cross Blue Shield Antitrust Litigation: Update on the Issues

May 4, 2016

12:00pm EST

Irina Rodriguez, Moderator
Office of the New York Attorney General

Alicia Batts

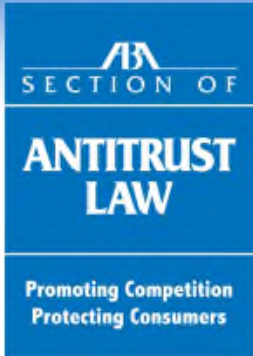
SQUIRE
PATTON BOGGS

Ankur Kapoor

CONSTANTINE | CANNON

Joshua Soven

GIBSON DUNN



The Parties

Plaintiffs

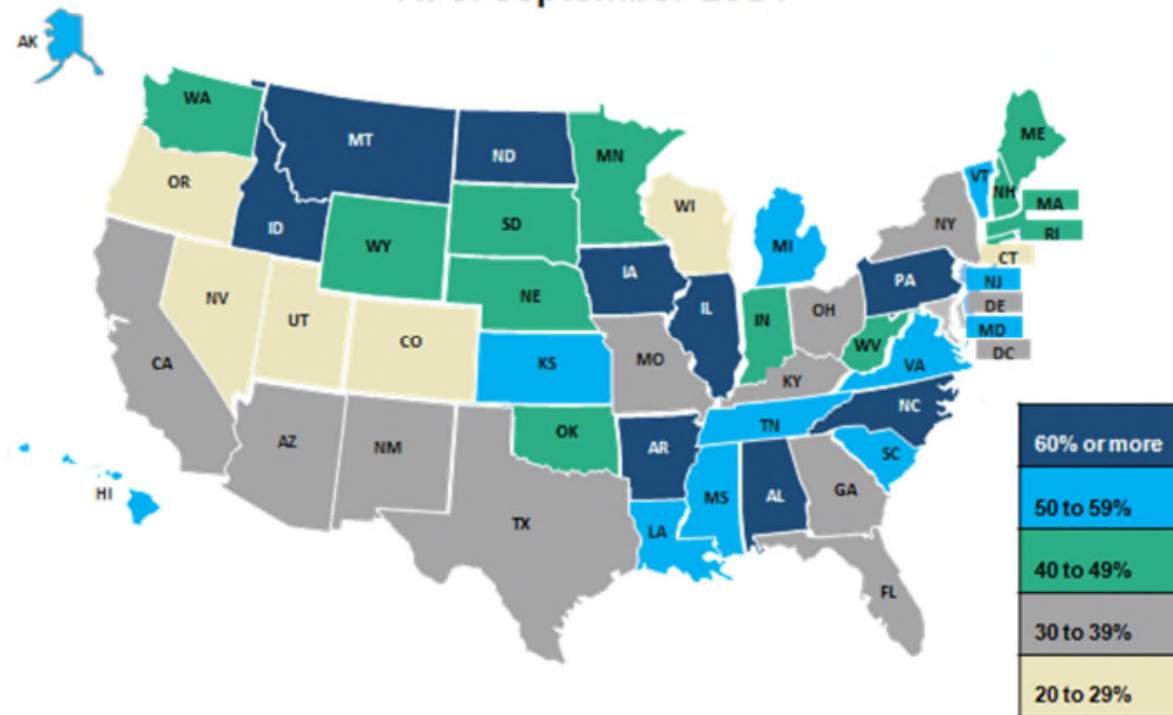
- Healthcare providers
- Small-employer customers

Defendants

- BCBS Association
- 36 BCBS Companies
- BC plan in each state
 - Subscribers name 62 BC companies
 - Providers name 70 BC plans plus consortium health plans, NASCO, BCBSA

Blue Cross Blue Shield Health Insurers Cover About One Third Of Americans

Blue Cross Blue Shield Plans
Medical Membership Market Share
As of September 2014



Source: Comprehensive medical membership data, Health Coverage Portal™, Mark Farrah Associates

The Lawsuit Alleges “Cartel-Like” Control Over Market

Case 2:13-cv-20000-RDP Document 236 Filed 11/25/14 Page 1 of 162

FILED
2014 Nov-25 PM 03:37
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: BLUE CROSS BLUE SHIELD)
ANTITRUST LITIGATION) Master File No. 2:13-CV-20000-RDP
(MDL No. 2406)) This document relates to:
) THE PROVIDER TRACK

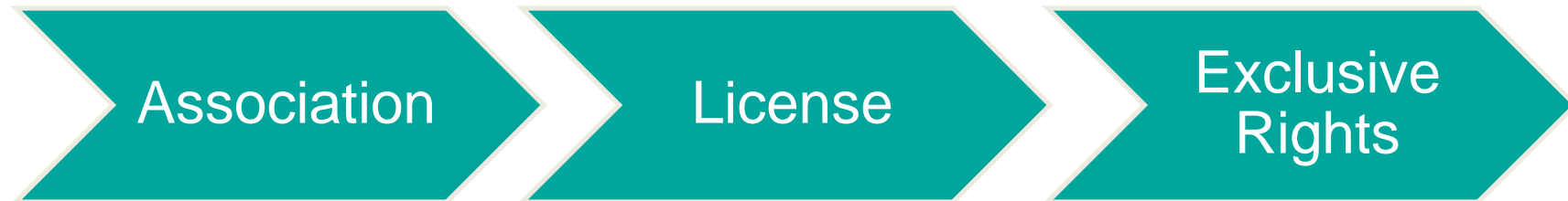
Jerry L. Conway, D.C.,)
Corey Muselman, M.D.,)
The San Antonio Orthopaedic Group, L.L.P.,)
Orthopaedic Surgery Center of San)
Antonio, L.P.,)
Charles H. Clark III, M.D.,)
Crenshaw Community Hospital,)
Bullock County Hospital,)
Fairhope Cosmetic Dentistry and Fresh)
Breath Center, P.C.,)
Sports and Ortho, P.C.,)
Kathleen Cain, M.D.,)
Northwest Florida Surgery Center, L.L.C.,)
Wini Hamilton, D.C.,)
North Jackson Pharmacy, Inc.,)
Neuromonitoring Services of America, Inc.)
Cason T. Hurd, D.M.D.,)
ProRehab, P.C.,)
Texas Physical Therapy Specialists, L.L.C.,)
BreakThrough Physical Therapy, Inc.,)
Dunn Physical Therapy, Inc.,)
Gaspas Physical Therapy, P.C.,)
Timothy H. Hendlin, D.C.,)
Greater Brunswick Physical Therapy, P.A.,)
Charles Baranwell, D.C.,)
Brain and Spine, L.L.C.,)
Heritage Medical Partners, L.L.C.,)
Judith Kanzie, D.C.,)
Brian Roadhouse, D.C.,)
Julie McCormick, M.D., L.L.C.,)
Harbir Makin, M.D.,)
Saket K. Ambacht, M.D.,)
John M. Nolte, M.D.,)
Bauman Chiropractic Clinic of Northwest)
Florida, P.A.,)
Joseph S. Ferezy, D.C. d/b/a Ferezy Clinic of)

) CORRECTED CONSOLIDATED
) SECOND AMENDED PROVIDER
) COMPLAINT

The complaint alleges:

- Defendants reached an explicit agreement to divide the United States into “Service Areas”
- They allocated these geographic markets among the Blues,
- The Blues agree not to compete with each other within those markets
- As a result of decreased competition due to the market allocation
 - Providers are paid much less by the Blues than they would be absent Defendants’ conspiratorial conduct;
 - Consumers are forced to pay inflated premiums

Blue Cross Blue Shield Licensing Model

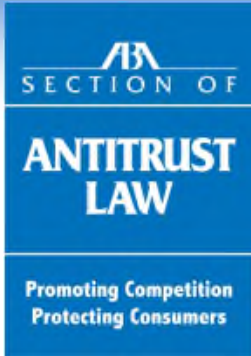


BCBS Vigorously Defends Its Licensing Practice

BCBS arguments:

- These licenses simply codify ancient trademark rights
- They do not constitute an agreement to do anything unlawful
- Federal regulators have long known about these licenses and have never raised antitrust concerns/action
- Agreements ensure that members focus on building the Blue brand
- The agreements increase competition by helping the Blue companies to align against national insurers





BCBS Vigorously Defends Its Licensing Practice

“This is a model that has withstood scrutiny over our entire history” “There’s no smoky room involved, there’s no dividing up.” “[I]nsurers’ rates are closely watched by state regulators.”

Scott Nehs

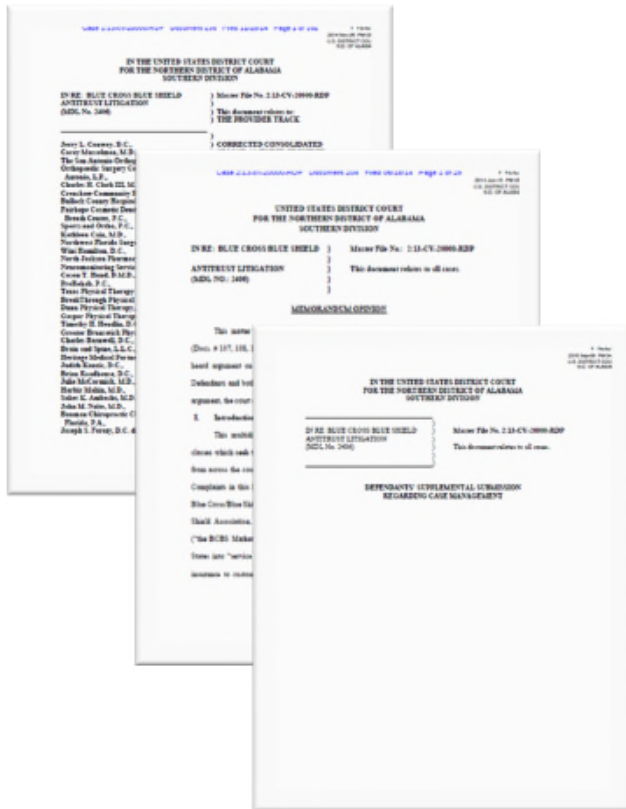
General Counsel

“Our company operates in compliance with a license from the Blue Cross and Blue Shield Association. We comply with all state and federal laws and continue to believe the allegations in the case do not have any merit.”

Koko Mackin

BCBS AL, VP, Corporate Communications and Community Relations

What Is The Current Status Of The Lawsuit



- Discovery is ongoing
 - In response to 159 RFPs, Defendants have produced over 10 million documents to be searched from 23 custodians, including CEO
 - Plaintiffs seeking discovery from non-Alabama Defendants as well
- Court allowing Alabama claims to move forward first
 - Defendants filing SJ motions on filed rate doctrine
 - Mediation is ongoing at the same time
 - Plaintiffs taking deposition of Alabama Department of Insurance re: filed rate defense
 - Plaintiffs allege Alabama is the most concentrated state in the U.S.
 - Fact Discovery ends 2/28/2017, but parties must substantially complete production by 9/30/2016
 - Amended complaints due 11/14/16
 - Dispositive motions 12/15/17

Potential Legal Ramifications

- The lawsuit brings forth “some surprisingly strong claims . . . It’s sort of antitrust law 101 that direct competitors can’t agree to divvy up their territory.”
Mark Hall, Wake Forest Law
- “it’s going to be hard to show those entities are making the large margins implied” in the lawsuit. Scott E. Harrington, UPA Wharton School
- “You’ll be looking for cartel-like behavior or the protection of intellectual property. That will probably be the most significant evidentiary test.” Barak D. Richman, Duke Law
- “The fact that someone’s been doing something a long time doesn’t make it right, and doesn’t make it legal.” Joe Whatley, Plaintiff Atty

Class Certification Issues

Two Proposed Groups of Classes

Subscriber Classes

- “All persons or entities who [during the damages period] have paid health insurance premiums . . . for individual or small group full-service commercial health insurance.” Compl. ¶¶263-279.
- 17 classes, one each for subscribers in each state/service area of the Blues
- 1 nationwide injunctive-relief class

Class Certification Issues

Provider Classes

- Damages: “All healthcare providers . . . in the United States of America provid[ing] covered services, equipment or supplies to any patient who was insured by . . . a Defendant [during the damages period]. Compl. ¶ 215
- Injunctive relief: “All healthcare providers . . . in the United States of America.” Compl. ¶ 214.

Class Certification Issues

Inter-Class Conflicts

- This is a unique case where one class (providers) asserts an antitrust injury (low reimbursement rates) which tends to benefit the other class (subscribers who may have paid lower premiums as a result).
- And vice-versa: subscribers' assertion of high premiums will tend to show that providers benefited from higher reimbursement rates.
- Each class will be putting forth evidence that the other class wasn't injured.

Class Certification Issues

Effect of Blues' MFNs

- Required providers to charge Blues' competitors more
 - MI; NC; PA; SC
- Subscribers: Comcast problem
- Providers: benefited → inter-class conflict

Class Certification Issues

Relevant Markets

- Product market: “full-service commercial health insurance to individual and small group consumers”
- Geographic markets: about 900 in total
- For example, in Alabama:
 - 12 MSAs; 13 Micropolitan SAs; 24 counties
 - 49 geographic markets for 1 Alabama class

Class Certification Issues

Proving Class-wide Liability and Damages

- The plaintiffs must prove anticompetitive effect in each relevant geographic market. → Dozens of market analyses for each of the 17 subscriber classes
- Must account for competitive conditions in the actual world in each market
 - Which entities were competing with the Blue?
 - Were they effective competitors?
 - Did the Blue have market power?

Class Certification Issues

Proving Class-wide Liability and Damages

- Must reliably construct competitive conditions in the but-for world in which the Blues were allowed to compete with one another
 - Was there a Blue which could have and would have entered the market? When? How would it have performed?
 - Would the Blues competing in one service area have merged, as many Blues have over the years?
 - A merger of two or more Blues eliminates the conspiracy under the Copperweld doctrine.

Policy Implications

Case Implicates Central Issues of Health Care and Joint Venture Policy

- Payer Market Structure
 - What's the optimal trade-off between efficient scale and market power for promoting greater use of narrow panel networks, clinical integration, and capitation?
 - Does upstream market power benefit consumers or payers?
 - Are there different effects in fully-insured and self-insured markets?
 - Does excessive concentration at the payer level promote bilateral monopolies, which limits provider competition?

Policy Implications

- Entry Barriers in the Health Insurance Sector
 - Formulating provider network at competitive cost
 - Brand loyalty – asymmetric information
 - Disaggregating demand from large employer groups

Policy Implications

- Steps Policymakers Could Take to Limit Effects of Alleged Conduct
 - Increased price and quality transparency at the payer and provider levels
 - Greater internalization of costs and benefits