



6th Circuit Rejects Blue Cross of Michigan Appeal in "Most Favored Nation" Clause Antitrust Dispute on Jurisdictional Grounds

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On February 23, the 6th Circuit denied Blue Cross of Michigan's attempt to gain immediate appeal review of an adverse ruling from the District Court in *United States v. Blue Cross of Michigan*, the DOJ's high-profile antitrust challenge to Blue Cross's use of "most favored nation" clauses in its provider contracts. The court's unwillingness to reconsider the District Court's denial of Blue Cross's "state action doctrine" defense at this time - a defense that would have potentially ended the case if the court ruled in favor of Blue Cross - virtually ensures that the issue will not be revisited prior to the completion of discovery and trial. Accordingly, the court's ruling constitutes a significant lost opportunity for Blue Cross. More importantly (at least for everyone other than Blue Cross), the court's decision not to hear the matter constitutes a lost opportunity for further guidance on the most favored nation clause issue generally, at a time where such guidance would have been incredibly beneficial, given the DOJ's acknowledgement that it is currently investigating the use of such clauses by other health insurers as well. In short, had the court ruled that Blue Cross's conduct was protected state action, such guidance could, conceivably, have led to the termination of the investigations, or at a minimum provided some additional clarification on the issue. As such, the 6th Circuit's decision not to hear the matter is quite unfortunate, but, as the 6th Circuit's decision makes clear, jurisdictional principles precluded them from hearing the appeal at this time.

In reaching its decision to dismiss Blue Cross's appeal, the 6th Circuit noted that it was faced with an interlocutory appeal, which the court typically has no jurisdiction to decide. The court further noted that the "collateral order doctrine" - on which Blue Cross had pinned its hopes - permits only a "small class" of prejudgment orders to be immediately appealed. Citing the Supreme Court's 2006 decision in *Will v. Hallock*, the Court reaffirmed that, for jurisdiction to exist under the collateral order doctrine, the order a party seeks to appeal must (1) conclusively determine the disputed question; (2) resolve an "important issue completely separate from the merits" of the case; and (3) be "effectively unreviewable on appeal from a final judgment."

Blue Cross's appeal, the 6th Circuit held, did not meet this standard. As the court noted, its 1986 decision in *Huron Valley Hospital v. City of Pontiac* held that a district court's denial of a state action doctrine defense was not immediately appealable under the collateral order doctrine, and "unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting *en banc* overrules the prior decision," the panel remained bound by *Huron Valley*. Accordingly, Blue Cross's contention that subsequent case law in other circuits that have decided the issue differently warranted a different result was simply irrelevant.

Whether Blue Cross will seek *en banc* review is, at this point, unclear. What is not unclear, however, is that the case appears to be headed towards a protracted, and costly (both in time and money), discovery battle. In addition, as noted above, an opportunity for the courts to bring some clarity to this unclear, but extremely important, issue has been lost. Stay tuned.

President Obama Nominates William Baer to Lead DOJ Antitrust Division

On February 6, President Obama announced the nomination of William J. Baer to lead the DOJ Antitrust Division as the administration's new Assistant Attorney General for Antitrust. Baer, who is currently in private practice, served as the Director of the FTC's Bureau of Competition from 1995 to 1999 and is not expected to face any significant challenge to his confirmation. If confirmed, Baer would replace Sharis Pozen, who has served as Acting Assistant Attorney General for Antitrust since the departure of Christine Varney in September of 2011. Pozen recently announced that she intends to step down from the post on April 30.

Because the Senate has not yet scheduled a hearing to consider Baer's nomination, much less scheduled a vote on his potential confirmation, it is highly unlikely that he will be confirmed prior to Pozen's scheduled departure. At this point, it is unclear whether this delay may lead Pozen to reconsider her departure date, or, alternatively, whether someone else will fill the role of Acting Assistant Attorney General pending action on Baer's nomination. In any event, regardless of who leads the Antitrust Division during 2012, it is unlikely that the Division's enforcement priorities will change in any material way before the November 2012 elections.

Montana Insurance Commissioner Approves Transfer of New West Insureds to Pacific Source, Permitting Final Settlement of DOJ Action against Blue Cross of Montana to Proceed

On February 23, Montana Insurance Commissioner Monica Lindeen approved a proposal by New West Health Services, a Montana health insurer, to transfer almost 10,000 insureds to PacificSource Health Plans. The transfer was required by the DOJ Antitrust Division to settle an antitrust action brought by the DOJ late last year against New West and Blue Cross of Montana. In that action, the DOJ contended that New West's sale of another part of its commercial insurance business to Blue Cross of Montana would likely have caused New West to exit that market, and that the elimination of New West as a competitor would have ultimately led to higher prices and lower quality service for consumers. Accordingly, the DOJ required that New West sell the remainder of its commercial insurance business to a third party insurer that would step in and replace New West as a viable competitor to Blue Cross.

In announcing her approval of the deal, Commissioner Lindeen stated that "New West customers will keep the same benefits under PacificSource as they had under New West," and that "This agreement preserves the range of options available to Montanans in our health insurance market." Her decision follows a February 7 hearing at which representatives of New West and PacificSource laid out the terms of the proposed agreement, and at which no opposition to the proposal was voiced.

The Commissioner's approval of the New West divestiture to PacificSource was the last step necessary to implement the DOJ's settlement with New West and Blue Cross of Montana. Accordingly, the DOJ has now filed a request for final approval of the settlement with the District Court in Montana. In its papers, the DOJ notes that it received only one comment on the proposed settlement, and that the comment was from the American Medical Association, which applauded the DOJ for "fashioning a remedy that hold[s] the promise of nurturing competition in Montana." Judicial approval of the settlement is expected.

For more information about this topic, please contact the author or any member of the Williams Mullen Antitrust Team.

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