Justice Department Halts Blue Cross of Montana's Expansion Plans Based Upon Competitive Concerns

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In early November, the DOJ Antitrust Division announced the filing of an antitrust lawsuit against Blue Cross of Montana, which is the largest health insurer in Montana. The suit alleged that a proposed agreement Blue Cross had struck with five Montana hospitals for them to transfer their employees' health insurance coverage from New West, a rival health insurer owned by the hospitals, to Blue Cross would have anticompetitive effects in the Montana health insurance market. In its complaint, the Antitrust Division alleged not only that the transaction would impermissibly increase Blue Cross's market share, but, more importantly, that it would diminish the hospitals' continued interest in having New West serve as a strong competitive alternative to Blue Cross. Ultimately, the Antitrust Division contended, the transaction would lead to New West's collapse, which would reduce the number of commercial insurers operating in Montana from three to two, and permit Blue Cross -- according to the Antitrust Division -- to "increase prices and reduce the quality of its commercial health-insurance plans."

Rather than fighting the Antitrust Division's allegations, Blue Cross and the hospitals agreed to an immediate settlement of the action. Under the proposed consent judgment, the parties' $26 million transaction can proceed, but not until the hospitals first divest the remainder of New West's commercial insurance business to another health insurer that has "the intent and capability to be an effective competitor." Believing that a swift divestiture was required to maintain New West's viability, the Antitrust Division quickly approved PacificSource Health Plans, an Oregon-based insurer, to purchase New West's remaining commercial insurance business, and the parties are reportedly working on the details of the transaction.

Notably, the proposed consent judgment also imposes several other requirements on the parties that the Antitrust Division contends are needed to insure that PacificSource will be able to compete effectively in the market as a replacement for New West. Among them, the hospitals will be required to enter into three year contracts with PacificSource, on terms substantially similar to those the hospitals had provided to New West. The hospitals will also be required to use their “best efforts” to assign the contracts of as many other providers in the New West provider network to PacificSource as possible to help insure that PacificSource will be able to provide a suitable alternative to Blue Cross. In addition, the proposed consent judgment imposes several restrictions on Blue Cross’s contracting with providers as well. Absent the prior approval of the Antitrust Division, Blue Cross is prohibited from entering into any exclusive contracts with health care providers or health insurance brokers, and is also prohibited from entering into any “most favored nation” clause agreements with providers that would grant Blue Cross rates that are equal to or better than those offered to other insurers (including but not limited to PacificSource).

The Antitrust Division’s action against Blue Cross of Montana is significant for several reasons. First, it reconfirms that the Antitrust Division’s focus on competition in health insurance markets shows no signs of abating, and when coupled with the Antitrust Division’s “most favored nation” clause antitrust action against Blue Cross Blue Shield of Michigan (which is currently pending in the Eastern District of Michigan) and the Division’s subsequent, follow-on investigation of several other insurers regarding the use of most favored nation clauses announced earlier this year, it is fair to say that the health insurance industry has been one of the prime targets of the Division’s enforcement efforts this year. Second, the terms of the proposed consent judgment confirm that, in the health care area, the Division views exclusive agreements and most favored nation clauses as having a significant potential to cause anticompetitive harm -- depending upon the market dynamics in the particular market in which they are used, of course. Finally, Acting Assistant Attorney General for Antitrust Sharis Pozen’s statement on the announcement of the settlement that the Antitrust Division is “committed to preserving competition in the health insurance industry, because competition spurs insurers to lower prices, enhances services and increases quality,” provides good reason to believe that health insurer contracting practices will continue to be the subject of considerable antitrust scrutiny in 2012. Stay tuned.

Auto Insurers Again Seek to Have New York Auto Glass Repair Company Antitrust Case Dismissed

Earlier this year, a New York auto glass repair dealer brought an antitrust action against a collection of auto insurers and third-party glass claims administrators, contending that the insurers’ refusal to compensate him for auto glass repairs at his standard rates, which exceed those charged by the repair shops in the insurers’ glass networks, violates the antitrust laws. *Harner v. Allstate Insurance Co.,* case no. 11cv-02933-CS (S.D.N.Y.). After the defendants announced their intention to file a motion to dismiss the complaint, outlining the grounds for the motion in a position paper to the court (as required under the court's local rules), the plaintiff chose to file an amended complaint rather than having the court rule on the motion.

In October, plaintiff filed his amended complaint, but, despite modifying some of his original allegations, the defendants maintain that plaintiff's antitrust allegations still fail as a matter of law. Accordingly, on December 12 the defendants filed motions to dismiss the amended complaint, asserting that the plaintiff's antitrust claim fails sufficiently to allege either (1) antitrust injury or (2) the existence of an antitrust conspiracy among the defendants. Specifically, with respect to antitrust injury, the non-insurer defendants (Pittsburgh Glass Works, LYNX Services and Safelite Group), maintain that plaintiff's antitrust claim is fundamentally, and fatally, flawed because "plaintiff's real complaint is that there is too much – not too little – competition, which may erode his profits" and that "because the basic injury he complains of – lower prices – is the antithesis of antitrust injury," his claim fails as a matter of law. Echoing this sentiment, the insurers contend that, "Because plaintiff's losses result from beneficial competition from other glass repair shops, they are the opposite of antitrust injury and, thus, cannot be salvaged by further repleading." Defendants further note that several courts have previously held that an insurer's establishment of "customary rates" for the purchase of third party services on behalf of insureds is typically not actionable because the establishment of such rates is usually beneficial to competition. *See, e.g., Quality Auto Body, Inc. v. Allstate Insurance Co.,* 660 F.2d 1195 (7th Cir. 1981) (affirming dismissal of claim challenging "prevailing rates" on antitrust injury grounds).

Defendants also contend that plaintiff's antitrust claim fails because his conspiracy allegations fail adequately to plead an illegal agreement. The insurer defendants note that the Supreme Court's *Twombly* decision requires a plaintiff to allege how, when and why each defendant joined the alleged conspiracy, and the role played by each defendant in it, which they maintain are absent from plaintiff's amended complaint. Moreover, they contend that each insurer has a "strong, independent economic incentive to obtain automobile glass repair and replacement services from reputable providers at competitive rates, as all insurer defendants share their insured customers' interest in buying quality services at a favorable price," and thus no inference of joint conduct is appropriate based solely upon the fact that several insurers have created similar glass repair networks. Finally, the third party glass administrator defendants argue that, as agents for the insurers, they are not capable of conspiring with them. *See, e.g., F.B. Leopold Co. v. Roberts Filter Manufacturing Co.,* 882 F. Supp. 433 (W.D. Pa. 1995) (corporation legally incapable of conspiring with its independent sales representatives under Section 1 of the Sherman Act).

Plaintiff's response to the defendants' motions to dismiss the amended complaint is due in February. Accordingly, a ruling by the court will likely arrive sometime this Spring, bringing some additional clarity to this often-litigated (and somewhat muddled) legal issue. Stay tuned.

Stakes Raised in Blue Cross of Michigan "Most Favored Nation" Clause Antitrust Dispute as Aetna Jumps in as an Antitrust Plaintiff

Blue Cross Blue Shield of Michigan ("BCM") has been in litigation with the Department of Justice Antitrust Division for more than a year over BCM's use of "most favored nation" clauses in its contracts with health care providers. *United States v. Blue Cross Blue Shield of Michigan,* case no. 10-cv-14155- DPH (E.D. Mich.). The antitrust risks facing BCM were increased significantly in early December, however, when Aetna filed its own suit against BCM in Detroit federal court, contending that BCM's use of the provisions was designed to "strangle its nascent competitor (Aetna)" and that these "exclusionary contracts" have "ensured that Aetna could not negotiate for favorable rates," making competition with BCM impossible.

Aetna's lawsuit is not particularly surprising, given that the DOJ's lawsuit specifically alleged that BCM's use of the clauses (which DOJ contends required providers to charge all insurers other than BCM rates equal to or higher than those charged to BCM), has handicapped the ability of rival insurers, including Aetna, to compete with BCM – precisely the contention made in the Aetna suit. Quite unlike the DOJ lawsuit, however, which principally seeks injunctive relief as a remedy should the DOJ prevail (barring BCM from continuing its use of the clauses), the Aetna lawsuit seeks to recover treble damages, costs and attorneys' fees. Moreover, while the complaint does not disclose precisely how much Aetna seeks in the lawsuit, Aetna does allege that it invested nearly $390 million in its attempt to mount a "serious competitive challenge" to BCM in Michigan and that this investment was frustrated by BCM's alleged conduct. Accordingly, particularly with the prospect of recovering treble damages, the financial stakes in the Aetna litigation likely make the case no less significant for BCM than the DOJ case.

BCM has publicly denied Aetna's allegations, and its formal response to the Aetna complaint is currently due at the end of December. BCM's response is likely to adopt many of the same arguments BCM has advanced in defense of the DOJ case, which is currently proceeding at both the district court and appellate court levels. For both cases, much will likely turn on how the Sixth Circuit handles BCM's pending appeal of the District Court's denial of BCM's motion to dismiss the DOJ complaint, and a companion motion filed in the Sixth Circuit by DOJ challenging BCM's right to file an appeal at this juncture on jurisdictional grounds. Until the Sixth Circuit has ruled on these important issues, predicting the future course of either the DOJ case or the Aetna case is simply impossible. Stay tuned.

Ohio Attorney General Recovers Almost $2 Million from Insurer for Antitrust Violations

On December 6, Ohio Attorney General Mike DeWine announced that the Ace Insurance Group had agreed to pay $1.97 million to settle an action in which Ace was alleged to have violated the Ohio antitrust laws. The action, *State of Ohio v. American International Group, et al.,* was brought by the Ohio Attorney General's office in 2007 on behalf of Ohio universities, schools, cities and counties, and alleged that Ace had agreed with several other insurers and insurance brokers not to compete with each other for commercial insurance customers in Ohio.

The allegations in the Ohio Attorney General's action paralleled those made by the private plaintiffs in the *In re Insurance Brokerage Antitrust Litigation,* an MDL antitrust class action proceeding that was litigated in the District of New Jersey. While the defendants in that action initially succeeded on a motion to dismiss the complaint at the district court level, in August of 2010 the 3rd Circuit reversed the district court's dismissal, sending the action back to the district court for further proceedings. Subsequently, in March of 2011, most of the defendants reached a settlement with the plaintiffs to resolve the matter in return for a payment of $37 million.

The Ohio Attorney General's settlement with Ace brings the Ohio case to a close. (The State had previously settled the matter with AIG ($9 million), Zurich ($7 million), St. Paul/Travelers ($6.6 million) and Marsh & McLennan ($4.75 million)). In announcing the settlement, Attorney General DeWine declared that it "should send a message that we will vigorously enforce the antitrust laws to ensure that Ohio's citizens and its businesses get the benefit of a healthy competitive marketplace."

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