

# Client Alert

Antitrust &amp; Litigation Practice Group

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## Recent Lawsuits Allege Anticompetitive Market Allocation Conspiracy by Blue Cross and Blue Shield

Two recent lawsuits allege that Blue Cross and Blue Shield entities in North Carolina and Alabama have violated federal and state antitrust laws by engaging in concerted action with other Blue Cross Blue Shield (BCBS) plans nationwide to divide geographic markets among them, which has allegedly resulted in reduced competition and higher rates charged to end customers for healthcare services. The cases may have significant implications for providers: if the plaintiffs' allegations are true, then it follows that BCBS' practice of allocating markets may also have restricted healthcare providers' ability to obtain reimbursement rates that would likely be available in a more competitive market.

The North Carolina case, *Cerven v. Blue Cross and Blue Shield of North Carolina*, was filed this past February and is pending before the U.S. District Court for the Western District of North Carolina. It is a class action on behalf of two classes: subscribers of any health insurance plan that is a party to a license agreement with the Blue Cross and Blue Shield Association (BCBSA) that restricts the ability of that health insurance plan to do business outside of its assigned geographic area, and all persons or entities that have paid health insurance premiums to BCBS-NC for full-service commercial health insurance. According to the Complaint, BCBS-NC currently exercises "market power" in the commercial health insurance market throughout North Carolina, enrolling 73.8% of subscribers of full-service commercial health insurance plans whether via an HMO or PPO. It has allegedly been able to do so as a result of an agreement with 37 other BCBS entities, pursuant to which BCBS-NC has the exclusive right to do business in North Carolina so long as it does not compete with any of the other BCBS entities in their assigned and exclusive geographic areas.

In April, a different group of plaintiffs in Alabama asserted an antitrust claim against Blue Cross and Blue Shield of Alabama (BCBS-AL) and BCBSA based on the same alleged market allocation agreement at issue in the North Carolina complaint. BCBS-AL allegedly has a 90% share of the health insurance market in Alabama. The case, *Richards v. Blue Cross and Blue Shield of Alabama*, is also a class action and is pending before the U.S. District Court for the Northern District of Alabama.

Historically, Blue Cross and Blue Shield plans, which began as independent entities, competed with one another. In the 1980s, however, the independent BCBS entities formed BCBSA, which operates as the licensing vehicle for the Blue Cross and Blue Shield trademarks and trade names. The

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independent BCBS entities control BCBSA, and allegedly agreed that all existing Blue Cross and Blue Shield plans should consolidate at a local level and that all Blue Cross and Blue Shield plans within a state should further consolidate, so that only one BCBS entity would operate per state. The BCBS entities allegedly agreed to maintain exclusive service areas, and any failure to abide by the market allocations would result in the termination of the BCBS entity's license to use the Blue Cross and Blue Shield trademarks and trade names. Finally, the BCBS entities, via the BCBSA licensing agreement, allegedly extended the market restrictions to BCBS entities' "non-Blue" brands, preventing these non-Blue brands from competing with the BCBS entity in an assigned geographic market.

The plaintiffs in both cases assert that the respective BCBS state entity's geographic market restrictions are a *per se* violation of Section 1 of the Sherman Act, which states that "every contract, combination . . . or conspiracy in restraint of trade or commerce" shall be illegal. According to the plaintiffs, but for the market restrictions, BCBS entities, as well as their non-Blue brands, would compete for health plans, which would ultimately result in lower premiums for their enrollees. In addition to the market restrictions, in the North Carolina case the plaintiffs allege that BCBS-NC violates antitrust laws through the use of most-favored nation (MFN) clauses in its contracts with providers. These clauses ensure that BCBS-NC receives the best pricing from providers for healthcare services by requiring those providers to charge BCBS-NC's competitors either more than, or no less than, what the provider charges BCBS-NC for the same services. Both the North Carolina and Alabama plaintiffs seek treble damages based on the amount by which premiums charged by the respective BCBS entity—BCBS-NC or BCBS-AL—have been artificially inflated due to its anticompetitive conduct. The North Carolina plaintiffs also seek an injunction preventing BCBSA and BCBS-NC from entering into or enforcing the market restrictions on BCBSA member plans, and a reform of any agreements between BCBS-NC and healthcare providers that would strike any MFN clauses as void and unenforceable.

## ***Key Takeaways***

Although the plaintiffs' complaints in both cases focus on the alleged harm to the end customers of healthcare services, if the plaintiffs' allegations regarding BCBS' practice of allocating markets are accurate, healthcare providers may also be affected. The market allocations may reduce competition in a given geographic area between healthcare plans, including BCBS entities that might otherwise compete. Because a single BCBS entity can allegedly dominate its assigned geographic market, that entity commands significant power in that market as a "buyer" of health providers' services. This arguably gives the BCBS entity an advantage in its negotiations with providers, who are faced with the choice of either accepting the terms offered by the dominant BCBS entity or forgoing a large share of the market for health services. Consequently, the BCBS entity may be able to negotiate lower reimbursement rates with the providers than it would otherwise be able to obtain in a more competitive market. Additionally, the BCBS entity may be able to leverage its dominant position to get providers to agree to MFN provisions, which have the potential to prevent providers from charging the BCBS entity rates that would result from a more competitive market.

King & Spalding's antitrust practice is one of the leading practices globally. If you have any further questions, please contact the authors, all of whom are experts in the area.

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