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# Can a Dominant Health Insurer's Refusal to Negotiate in Good Faith Be Actionable under the Antitrust Laws? Yes, Says a Federal Court in Rhode Island

*By Herbert F. Allen and Mitchell D. Raup*

Authors:

**Herbert F. Allen**
202.626.8307
hallen@polsinelli.com

**Mitchell D. Raup**
202.626.8352
mraup@polsinelli.com

On April 23, a federal court in Rhode Island fired a warning shot over the bow of dominant health insurers across the country, holding that a refusal to negotiate in good faith with a healthcare provider that focuses population health management in an attempt to block its entry could violate Section 2 of the Sherman Act.

The court denied Blue Cross & Blue Shield of Rhode Island's motion for summary judgment on claims that it blocked the acquisition of a financially-troubled Rhode Island hospital, Landmark Medical Center, by a Massachusetts hospital system, Steward Health, which sought to bring its innovative population-health-management business model to Rhode Island. According to the Court, a reasonable jury could conclude that Blue Cross's aggressive negotiating approach with Landmark was "designed to kill" Steward's acquisition of Landmark and, with it, the entry of a disruptive threat to Blue Cross's dominance.

Finally, in a separate order on May 15, the court denied Blue Cross's attempt to appeal the denial of its motion for summary judgment on the grounds that an immediate interlocutory appeal to the First Circuit would not "materially advance the ultimate termination of the litigation."

## Background

In 2008, Landmark was a financially-troubled hospital that had been forced into receivership. A court-appointed special master solicited bids from prospective buyers, including one from Steward, which operated a network of for-profit hospitals in Massachusetts.

Unlike most hospitals in Rhode Island, Steward's business model focused on population health management, meaning Steward received capitated payment on a per-member-per-month basis, rather than billing payers on a fee-for-service basis. Steward wanted to bring this disruptive model to Rhode Island by acquiring a number of hospitals in the state, beginning with Landmark.

Blue Cross viewed Steward's business model—and the increasing prevalence of "providers becoming payers"—as "existential threats." One Blue Cross document expressed concern that the appearance of providers willing to take on risk, including Accountable Care Organizations, could "result in significant enrollment losses and could negatively affect our long term viability as a health plan."

In 2010 and 2011, Steward submitted bids to acquire Landmark. A key prerequisite to any deal was a "non-hostile relationship" with Blue Cross and an in-network contract. With more than 70% market share in Rhode Island, Blue Cross was the primary source of income for services rendered at Landmark, as well as all other hospitals in the state.

Negotiations between Blue Cross and Steward stalled. Blue Cross insisted that Steward commit to meet quality metrics that Steward believed were "unattainable" for Landmark. Then, in May 2012, with negotiations faltering, Blue Cross filed an application for a material network modification with the Rhode Island Department of Health, and then sent notice letters informing Blue Cross's subscribers and providers that Landmark might go "out of network."

Frustrated at what it viewed as bad-faith negotiating tactics by Blue Cross, Steward withdrew from the bidding process. Finally, in June 2013, Steward filed its first antitrust complaint, alleging that Blue Cross's unilateral conduct violated Section 2 of the Sherman Act.

## The Court's Analysis of Steward's Refusal-to-Deal Claim

The court's analysis emphasized that this was a "close case—one that highlights the difficulty of applying less-than-clear antitrust doctrines and precedents to one of the most complicated and volatile sectors of the national economy." Indeed, the governing antitrust law was, according to the court, "confused and opaque."

***No Formulaic Test for Refusal-to-Deal Liability*** – Perhaps adding to the difficulty of discerning when a refusal-to-deal is actionable under Section 2, the Court observed that there is no formulaic "paint-by-the-numbers kit" for what a Section 2 claim "*must* look like." That is because "[p]otentially anticompetitive behavior by market participants is bound to manifest itself differently in different markets." Moreover there need not be an interruption of a prior course of dealing in a refusal-to-deal case, and appellate decisions that require such a course of dealing either misread Supreme Court cases on the subject (i.e., *Aspen Skiing* and *Trinko*) or deliberately extend their holdings. Instead, Section 2 liability should hinge on whether there is "harm to competition without a valid business justification, which can manifest itself in myriad ways." Thus, "[i]t is of no consequence that Blue Cross did not have or terminate a prior course of dealing directly with Steward and Landmark . . . the critical question is how Blue Cross dealt with Landmark in the context of the effort by Steward to purchase it."

***Blue Cross's Refusal to Deal Made No Economic Sense in the Short Run*** – As evidence that Blue Cross "sacrificed short-term profits for the longer-term benefit of eradicating potential competition from Steward," the court pointed to an internal Blue Cross analysis showing that the cost of pushing Landmark out of network would be $9.8 million—$4 million more than the cost of accepting rate increases proposed by Steward for Landmark.

***Blue Cross's Bad Faith Negotiation Amounted to a Refusal to Deal*** – Even though it was Steward that ultimately withdrew from the negotiation, the court found that Steward had presented facts sufficient for a jury to conclude that Blue Cross's rejections of Steward's proposals amounted to a refusal to deal. The court specifically pointed to the fact that Blue Cross rejected proposed rates for Landmark that were 5% *less* than the average rates Blue Cross paid to all hospitals in Rhode Island. And, referencing the "unattainable" quality metrics, the court added that "it does not matter that Steward 'walked away' from the negotiating table, if Blue Cross made an offer that it knew could not be accepted."

***Blue Cross Took Unprecedented Steps in Its Dealings with Landmark*** – Finally, the court emphasized that Blue Cross did things it had never done before in its negotiations with Landmark, including allowing Landmark to go "nonparticipating" and sending its members a letter on the subject. These actions, according to the court, "strayed far from [Blue Cross's] ordinary course of dealing with Landmark, or any other hospital."

## Takeaways

- Refusal-to-deal case law remains "opaque," in the words of the court. In the view of this court, there is no formulaic test for an actionable refusal to deal, which can be manifest "differently in different markets."
- An important component of this case is the fact that Blue Cross viewed the healthcare provider itself (Steward) as a horizontal competitor, because it sought to encroach on Blue Cross's role as the primary risk-bearing entity in the state of Rhode Island. This element of the opinion could be read as imposing a duty on large insurers to deal on reasonable terms when negotiating with risk-bearing providers.
- To be actionable, exclusionary efforts need not rise to the level of a clear-cut refusal to deal. Making offers to deal on unusual terms that simply cannot be accepted can be enough.
- Ordinary-course business documents remain critical in refusal-to-deal cases. Here, Blue Cross's own internal documents revealed the degree to which its negotiating tactics were out-of-the-ordinary, contrary to Blue Cross's short term economic interests, and motivated by a desire to exclude a provider it viewed as an existential threat.

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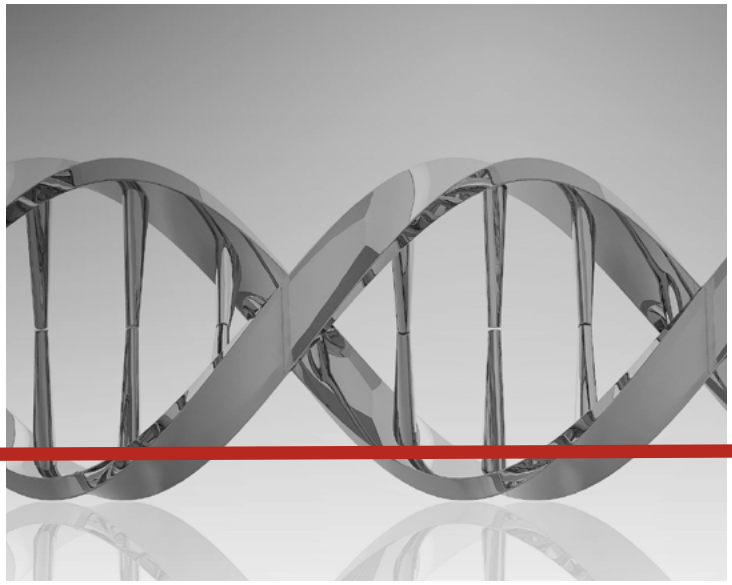

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