

Blues' most-favored nation clause called into question

Plaintiffs allege territorial Blues have made it difficult for competitors to enter certain markets

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Two Texas residents have filed a class action lawsuit against BlueCross BlueShield of Texas (Blue Cross Texas) and the BlueCross BlueShield Assn. The complaint alleges that the insurer's anti-competitive practices have artificially inflated insurance premiums; that they hold a monopoly in the individual and small group full-service commercial insurance market; and are actively seeking a monopoly in the private market.

Suing on behalf of themselves and a class of Texas residents who paid premiums to Blue Cross Texas within the last four years, the plaintiffs seek statutory and compensatory damages for themselves and the putative class. Blue Cross Texas is the largest insurer in Texas, insuring approximately 40% of enrollees in full-service commercial policies.

REDUCING THE COMPETITION

According to the plaintiffs, the defendants have engaged in anti-competitive practices in violation of the Sherman and Clayton Antitrust Acts. The complaint asserts that the 37 healthcare companies under the BlueCross BlueShield umbrella have conspired to reduce competition through a series of licensing agreements.

The plaintiffs contend that independent healthcare companies, like Blue Cross Texas, enter licensing agreements authorizing the marketing of health insurance under the BlueCross BlueShield name. According to the complaint, the licensing agreements divide the country into exclusive territorial areas. Upon signing an agreement, the licensee

would control a territory which would forbid other BlueCross licensees to offer coverage.

The complaint also asserts that the licensing agreements provide for sanctions if a member violates terms of the agreement. Competition by a licensee in another member's territorial area is subject to license and membership termination by BlueCross BlueShield, and no Blue Cross licensee may transfer ownership or control of its business to a non-Blue Cross licensee.

According to the plaintiffs, these territorial restrictions in the licensing agreements are horizontal agreements in violation of Section 1 of the Sherman Antitrust Act—specifically, the territorial limitations preventing other Blue Cross licensees from offering competitive health insurance in Texas. Similarly, the restraints on transfer of ownership allegedly prevent non-Blue Cross entities from quickly entering the market.

The plaintiffs argue that the restrictions, along with the insurer's market share, allow Blue Cross Texas to raise premiums without fear that customers will seek other insurance. They also claim that the insurer has no incentive to keep its costs down, resulting in higher premiums to consumers.

The complaint also alleges that the defendants violate Section 3 of the Clayton Antitrust Act by demanding "Most Favored Nation" clauses. Relying on its commanding market share, the plaintiffs claim that Blue Cross Texas can demand that providers charge less and that competitors can't negotiate a more favorable rate. The clauses would therefore prevent competitors from entering the market.

Finally, the plaintiffs assert that these steep discounts cause providers to raise prices, resulting in increased premiums for all consumers. They argue that Blue Cross Texas can raise its own premiums, assured that its "Most Favored Nation" status will keep its costs lower than its competitors. **MHE**

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