2024

The Blue Cross Blue Shield Antitrust Saga: How the Recent Class Action Settlement Will Impact Competition Among Health Insurers

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I. Introduction

In August 2022, the Blue Cross Blue Shield Association (BCBSA) settled a decade-long class action lawsuit for $2.67 billion. This lawsuit originated in January 2013 after BCBSA subscribers alleged BCBSA and its affiliates had been operating as an illegal cartel in violation of the Sherman Antitrust Act and equivalent state-level legislation. The complaint alleges that BCBSA had taken actions including the creation of horizontal agreements by its affiliates (independent health insurers who license the Blue Cross Blue Shield trademark from BCBSA) who control BCBSA through a power structure composed of its customers, members and governing board; that through these agreements, BCBSA and its affiliates divide the geographic marketplace for health insurance between themselves; that BCBSA has severely increased the barrier to entry required to become an affiliate of BCBSA; and that through this marketplace dominance, BCBSA affiliates have imposed Most Favored Nations clauses that further reduce competition within the marketplace. The complaint further alleges that these actions have overall reduced competition among health insurers, leading to an increase in premiums for the plaintiff classes and making it more difficult for the plaintiffs to switch providers.

Although the settlement has been approved, litigation is still ongoing, as multiple objections have arisen, as well as a parallel action on behalf of healthcare providers that remains unsettled. The settlement notably only imposes limited injunctive relief on BCBSA. BCBSA agreed to remove two requirements from its policies: one that was set upon its affiliates that prevent the affiliates from receiving more than one-third of their net revenue from outside the BCBSA brand; and the other that requires national employers to subscribe to the affiliate who controls the region the employer's headquarters is located within. The most substantive objection to the

settlement encompasses how this injunctive relief does not go far enough, allowing BCBSA and its affiliates to continue most of their anticompetitive practices.

How the settlement, objections, and parallel action all pan out are yet to be determined. Further, it is unknown what impact this settlement will have on future BCBSA actions, as well as the impact the settlement will have on the healthcare marketplace. This is not BCBSA's first time litigating antitrust claims against them. In analyzing BCBSA's prior actions in response to antitrust claims, BCBSA will likely not change their actions without changes in legislation or a binding court order against them. Based off the injunctive relief that BCBSA did agree to, the likely impact on the marketplace is a short-term increase in competition, but long-term competition will be suppressed. This long-term return to form will likely be caused by larger BCBSA affiliates swallowing up the smaller affiliates who will not be able to compete at the same level. Despite this, there are policies that, if enacted either by the government or BCBSA themselves, may solve the question as to how to regulate BCBSA properly and maintain long-term competition within the healthcare marketplace.

II. A History of Antitrust Laws in the United States

Antitrust legislation in the United States has long been intended to promote competition between competitors, while also protecting small businesses from being forced out of the market by the big players within a market. The United States has three core antitrust laws that help govern: the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914.[1] Additionally relevant to the health insurance market are the McCarran-Ferguson Act of 1945, as well as the recently unveiled Competitive Health Insurance Reform Act of 2020, which

[1] *The Antitrust Laws*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Apr. 11, 2023).

provided exemptions to the Sherman Act for certain markets (specifically in this case, health insurers), and stripped those exemptions away, respectively.[2] How all of these laws impact the BCBSA saga will lay the groundwork in explaining BCBSA's actions up to this point, as well as provide some insight as to how they may soon act in the future.

A. The Sherman Act of 1890, The Beginning of Antitrust Legislation

Towards the end of the 1800s, industries began to be dominated by entities that were comprised of several smaller companies who had organized their shares within a single set of trustees.[3] These entities, known as trusts, destroyed competition and rooted out smaller players in major industries.[4] In return, the trusts were able to function as monopolies, as the trustees ran the component companies, and the competition had been eliminated.[5]

Named for the Senator who penned it, the Sherman Act was the first piece of legislation introduced to the country to combat these trusts and create fair competition in country.[6] The language of the Sherman Act invalidates "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations."[7] Though most penalties for violating the Sherman Act are civil in nature, that does not mean they are not severe. The Sherman Act authorizes the federal government to start proceedings against trusts to dissolve them, and individuals found guilty of forming trusts were subject to fines of $5,000 and up to a year in prison.[8] In the present day, these criminal liabilities have been

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[2] Katie Keith, *Health And Dental Insurers Subject To Federal Antitrust Laws Health Affairs*, HEALTH AFFAIRS (Jan. 19, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210119.670140/.
[3] *Sherman Anti-Trust Act (1890)*, NATIONAL ARCHIVES, https://www.archives.gov/milestone-documents/sherman-anti-trust-act (last visited Apr. 11, 2023).
[4] *Id.*
[5] *Id.*
[6] CFI Team, *Sherman Antitrust Act*, CORPORATE FINANCE INSTITUTE, https://corporatefinanceinstitute.com/resources/economics/sherman-antitrust-act/ (last updated Jan. 9, 2023).
[7] Sherman Antitrust Act, 15 U.S.C.A. §§ 1, *et seq.* (2004).
[8] *Sherman Anti-Trust Act (1890)*, *supra* note 3.

increased to up to $100 million for a corporation, up to $1 million for an individual, and up to ten years in prison.[9] However, criminal prosecutions are usually limited in scope to clear and intentional violations of the Sherman Act.[10] In civil penalties, those who suffered losses because of the actions of trust are entitled to sue within federal court for triple damages.[11]

The drafting of the Sherman Act left many questions that needed answering in its early years. Failure to define several terms within the act ultimately required the Supreme Court to determine what was allowable under the act.[12] As such, the Sherman Act will only invalidate trusts or attempts to create trusts that were formed unreasonably.[13] Per se violations of the Sherman Act include actions such as price fixing, arrangements to divide markets, or bid rigging.[14] Instances of agreements between individuals to form a partnership that just so happens to restrain trade, where reasonable, will be lawful under the Sherman Act.[15]

B. Subsequent Trust-Busting Legislation

While the Sherman Act is the main player in antitrust legislation and enforcement within the United States, it does not do so on its own. The year 1914 saw the passage of two additional acts intended to support the Sherman Act: The Federal Trade Commission (FTC) Act and the Clayton Act.[16] The big three trust busting pieces of legislation were reigned in slightly in 1945 with the passage of the McCarran-Ferguson Act, which carved out an exemption for health

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[9] *The Antitrust Laws*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Apr. 11, 2023).
[10] *Id.*
[11] *Sherman Anti-Trust Act (1890)*, *supra* note 3.
[12] *Id.* (citing *United States* v. *E.C. Knight Co.*, 156 U.S. 1 (1895)).
[13] *The Antitrust Law*, *supra* note 9.
[14] *Id.*
[15] *Id.*
[16] *Id.*

insurance companies.[17] All of these legislative acts have sculpted the antitrust landscape for the last hundred-plus years.

The FTC Act's most prominent action was establishing the FTC, the government body designed to "protect[] the public from deceptive or unfair business practices and from unfair methods of competition."[18] The FTC Act otherwise largely encompasses the same language as the Sherman Act, such that the Supreme Court has even stated that Sherman Act violations are also FTC Act violations.[19] Therefore, while the Sherman Act does not allow the FTC to enforce it, the FTC Act allows the FTC to bring claims on the same violations as that of the Sherman Act.[20]

The Clayton Act expands the Sherman Act to address specific practices that the Sherman Act does not clearly prohibit.[21] These additional violations include actions such as anticompetitive mergers and predatory or discriminatory pricing.[22] Unlike the Sherman Act or the FTC Act, which can only be enforced by either the Department of Justice or FTC, respectively, the Clayton Act can be enforced by either entity.[23] Subsequent amendments to the Clayton Act have expanded the scope of the Act to require companies planning large mergers to notify the government in advance, as well as authorize private parties to claim triple damages when they were harmed by conduct in violation of either itself or the Sherman Act.[24]

In response to challenges to the Sherman Act and Congress's abilities to regulate health insurance competition under the Commerce Clause, the Supreme Court upheld the Sherman Act,

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[17] Mary Maloney Huss, *Eight Circuit Extends McCarran-Ferguson to Shield Alleged Monopolization of the Health Insurance Industry From Antitrust Scrutiny*, 15 WM. MITCHELL L. REV. 713, 720 (1989).
[18] *About the FTC*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/about-ftc (last visited Apr. 11, 2023).
[19] *The Antitrust Laws*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Apr. 11, 2023).
[20] *Id.*
[21] *Id.*
[22] Clayton Antitrust Act, 15 U.S.C.A. §§ 12-27 (2002).
[23] *Id.*
[24] *The Antitrust Law*, *supra* note 19.

allowing it to be applied to health insurance in 1944.[25] In response to these attacks, Congress passed the McCarran-Ferguson Act the following year.[26] The McCarran-Ferguson Act limited the Sherman Act's abilities to regulate the insurance market by creating an exemption for the health insurance market.[27] Through this exemption, the power to regulate insurance transferred from the federal government to the states.[28] It is important to note that the act itself limits the "business of insurance" and not the "business of insurance companies" themselves.[29] To help determine the distinction between "business of insurance" and "business of insurance companies," the Supreme Court created a three-factor test.[30] This test considers: (1) "whether the practice has the effect of transferring or spreading the policyholder's risk;" (2) "whether the practice is an integral part of the policy relationship between the insurer and insured;" and (3) "whether the practice is limited to entities within the insurance industry."[31] No one factor of the test is determinative, making this test difficult to apply.[32] Through the use of these exemptions, both BCBSA and other insurers have found multiple ways to circumvent antitrust enforcement against them.[33] While the McCarran-Ferguson Act had not completely barred the federal government from enforcing the Sherman Act, the power of the Sherman Act became extremely limited in its utility against health insurers.[34]

For eighty-five years, this was the way. Then, with the signing of the Competitive Health Insurance Reform Act (CHIRA) in 2020 largely stripped these exemptions away from the

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[25] Mary Maloney Huss, *Eight Circuit Extends McCarran-Ferguson to Shield Alleged Monopolization of the Health Insurance Industry From Antitrust Scrutiny*, 15 WM. MITCHELL L. REV. 713, 720 (1989).
[26] *Id.* at 720-21.
[27] *Id.* at 720.
[28] *Id.*
[29] *Id.* at 722.
[30] *Id.* at 723.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

insurance market.[35] With the removal of these exemptions, the federal government is now able to better investigate and enforce antitrust among the insurance markets, despite regulation being left to the states.[36] There are still some limitations to the Sherman Act, mainly that the Act contains carveouts allowing health insurers to collect and share data for regulatory purposes, and companies are still allowed to contract or work together in data collection.[37] Regardless, the removal of these exceptions are a big step in the promoting federal regulation of competition within the health insurance marketplace.

III. BCBSA's History With Antitrust Litigation

A. What Is BCBSA?

Blue Cross and Blue Shield each originated in 1929 as a means of making healthcare more affordable to members.[38] Covering Americans, Blue Cross and Blue Shield were distinct from each other until 1978, when they consolidated staff and operations.[39] In 1982, BCBSA was officially born.[40] Today, BCBSA works with over 1.7 million doctors to cover over 115 million members in all fifty states and over one hundred-seventy countries around the world.[41] Through their work with the government, BCBSA's Federal Employee Program covers over half of all federal employees in the United States.[42]

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[35] Katie Keith, *Health And Dental Insurers Subject To Federal Antitrust Laws Health Affairs*, HEALTH AFFAIRS (Jan. 19, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210119.670140/.
[36] *Id.*
[37] *Id.*
[38] *The Blue Cross Blue Shield System*, BLUE CROSS BLUE SHIELD, https://www.bcbs.com/about-us/the-blue-cross-blue-shield-system (last visited Apr. 11, 2023).
[39] *An Industry Pioneer*, BLUE CROSS BLUE SHIELD, https://www.bcbs.com/about-us/industry-pioneer (last visited Apr. 11, 2023).
[40] *Id.*
[41] *The Blue Cross Blue Shield System*, *supra* note 38.
[42] *Id.*

A common misconception is that BCBSA is a single health insurance company that covers the United States. However, BCBSA consists of thirty-four independent and locally operated companies.[43] The terms "Blue Cross" and "Blue Shield" are trademarks that BCBSA licenses out to their member companies, known as Blues affiliates.[44] Utilizing these trademarks has allowed the Blues affiliates to attach themselves to the brand recognition, awareness, and reputation that BCBSA has garnered over the years.[45] Some of the more well-known Blues affiliates include companies such as Anthem, Horizon, Highmark, Premera, and Wellmark.[46]

The question must be asked: how does this trademark to Blues affiliates work? A Blues affiliate is given the exclusive right to advertise as a Blue plan within a geographic area.[47] A Blues affiliate may license either the Blue Cross or Blue Shield trademark individually, or both trademarks at once.[48] Through this exclusive right, there are usually only one or two Blue affiliates within a given geographic area.[49] In the fifty states and DC, only eight states have more than a single Blues affiliate, with only two states (New York and Pennsylvania), having more than two.[50] As such, forty-two states (and DC) only have a single Blues affiliate operating within them.[51]

Lack of a trademark in each region does not preclude a company from competing within those regions. Those companies may still operate; however, they lack the ability to call themselves a "Blue plan" within a region.[52] Operation outside of regions where they are considered Blue

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[43] *Id.*
[44] *Id.*
[45] William Bednar & Stephanie Entzminger, *History of Competition Between "Blues" Health Plans and a Recent Antitrust Settlement*, AXENE HEALTH PARTNERS, LLC, https://axenehp.com/history-competition-blues-health-plans-recent-anti-trust-settlement/ (last visited Apr. 11, 2023).
[46] *BCBS Companies and Licensees*, BLUE CROSS BLUE SHIELD, https://www.bcbs.com/bcbs-companies-and-licensees (last visited Apr. 11, 2023).
[47] Bednar, *supra* note 45.
[48] *Id.*
[49] *Id.*
[50] *BCBS Companies and Licensees*, *supra* note 46.
[51] *Id.*
[52] Bednar, *supra* note 45.

affiliates does have some hurdles for the affiliates as individual companies. The main hurdle is that because the "Blue" branding is so important to the marketing success of the affiliates, they tend not to compete within regions they do not have the branding.[53] For the companies who have significant brand recognition without the "Blue" branding (such as Anthem), there is a separate hurdle. In order to maintain the "Blue" licenses, BCBSA requires its affiliates maintain at least two-thirds of national health plan revenues to be from a company's Blue-branded business.[54] As such, even when Blue affiliates want to advertise in regions where an affiliate already operates, they cannot expand their market share without risk of losing their "Blue" licenses elsewhere. This requirement is one of the chief allegations within the present complaint.[55]

B. BCBSA's Recent Antitrust History: United States v. Blue Cross Blue Shield of Michigan

BCBSA has had antitrust issues prior to the present action. A more recent example relates to issues that were brought up in the present action. In 2010, the Department of Justice (DOJ) and state of Michigan filed a suit against the Blues affiliate in Michigan, the Blue Cross Blue Shield of Michigan (BCBSM).[56] DOJ alleged in their complaint that certain provisions within BCBSM's agreements with hospitals, known as most favored nation clauses (MFNs), had resulted in hospitals raising their prices, preventing other insurers from entering the marketplace, and discouraging discounts.[57]

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[53] *Id.*
[54] *Id.*
[55] Subscriber Track Amended Consolidated Class Action Complaint at ¶¶374-383, *In re: Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, MDL No. 2406 (N.D. Ala. Dec. 19, 2014) (hereafter Subscriber Complaint).
[56] Press Release, United States Dep't of Just., Just. Dep't Files Antitrust Lawsuit Against Blue Cross Blue Shield of Michigan (Oct. 18, 2010).
[57] *Id.*

Generally, a MFN is a promise between buyer and seller that the seller will not give a third party a better price for a product.[58] Within the healthcare realm, a MFN usually takes the form of a health insurer (buyer) negotiating that a health service provider (seller) will not give an equal or better price to a different insurer.[59] While not per se unlawful under the Sherman Act, MFNs have a tendency to carry anticompetitive effects that may outweigh the benefits of the clauses. There is usually only a single health insurer per market that can secure MFNs within their provider contracts, a feat that only insurers with significant market power can obtain.[60] MFNs' anticompetitive effects fall under raising premiums for subscribers, reducing choice among providers, limiting the access to quality care, and blocking the creation of alternative health care models within the market.[61]

DOJ alleged within its complaint that the BCBSM MFN resulted in hospitals increasing prices to BCBSM's competitors, essentially insulating BCBSM from competition.[62] Through its MFN, BCBSM, in partnering with at least fifty-three percent of the state's hospitals, required these hospitals to either charge BCBSM no more than its competitors, or to charge the competitors a certain amount more than it charges BCBSM.[63] In certain instances, the MFN required hospitals charge BCBSM's competitors up to thirty to forty percent more than BCBSM was charged.[64] This disparity in pricing effectively discouraged competitors from entering into or expanding into the Michigan market, protecting BCBSM from competing with this competition.[65]

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[58] Beth Ann Wright, *How MFN Clauses Used in the Health Care Industry Unreasonably Restrain Trade Under the Sherman Act*, 18 J.L. & Health 29, 30 (2003-04).
[59] *Id.*
[60] *Id.* at 31.
[61] *Id.*
[62] Press Release, United States Dep't of Just., Just. Dep't Files Antitrust Lawsuit Against Blue Cross Blue Shield of Michigan (Oct. 18, 2010).
[63] *Id.*
[64] *Id.*
[65] *Id.*

Ultimately, in 2013, Michigan outlawed the use of MFNs by insurers, health maintenance organizations, and nonprofit health care corporations in contracts.[66] Because of this legislative action by the state, DOJ and BCBSM stipulated that the relief sought by the complaint was moot.[67] The action was then dismissed by the court, with no other binding precedent set out for the rest of the country to follow.[68] As such, in jurisdictions where MFNs have not been outlawed or banned, Blues affiliates still utilize them within their agreements.[69] The MFNs within these contracts are another activity by BCBSA and Blues affiliates that have been challenged within the present action.[70]

IV. The BCBSA Multidistrict Class Action Suit: How Did We Get Here?

A. The Claims Alleged Against BCBSA

In January 2013, classes of plaintiffs made up of both individuals and companies who served as employers served a complaint on BCBSA and all the Blues affiliates alleging violations of both the Sherman Act, as well as the relevant state-level equivalent legislation.[71] The claims were filed in multiple districts, before they were consolidated into the Northern District of Alabama as a multi-district litigation.[72] Through doing so, the BCBSA defendants are able to accomplish much of the litigation and discovery all under the same litigation, as opposed to handling all the litigations at the same time, which would eat up a great amount of money and resources.

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[66] Stipulated Motion and Brief to Dismiss Without Prejudice, *United States* v. *Blue Cross Blue Shield of Mich.*, No. 2:10-cv-14155-DPH-MKM (E.D. Mich. Mar. 25, 2013).
[67] *Id.*
[68] *Id.*
[69] Subscriber Complaint at ¶¶ 387-403.
[70] *Id.*
[71] Docket, *In re: Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, MDL No. 2406 (N.D. Ala. Feb. 14, 2023); Subscriber Complaint.
[72] Docket, *supra* note 71.

The plaintiffs make several allegations against BCBSA and its members in their complaint. The first of these allegations is that the Blues affiliates are more than just licensees of the BCBSA, but that the affiliates also control BCBSA as "its customers, its Member Licensees and its governing Board."[73] Because of this "unique structure," the affiliates, as opposed to independent directors and executives, are able to control the entry of new members who are seeking Blues licenses.[74] In addition to the approval of new members into the BCBSA, the complaint alleges that the affiliates also control the rules and regulations that must be followed by all members.[75] Lastly, the complaint alleges that all compliance and disciplinary processes for Blues affiliates is, again, left up to the affiliates, which hare administered by the Association's Plan Performance and Financial Standards Committee (PPFSC).[76]

The complaint goes on to allege that utilizing this power structure, the affiliates (as potential competitors themselves) utilize control of BCBSA to coordinate activities.[77] Despite their operation under the Blue banner, each affiliate is an independent legal organization, and the license agreements themselves state that nothing should be "construed to constitute the parties hereto as partners or joint [ventures], or either as the agent of the other."[78] Of the twenty-five largest health insurance companies in the country, fifteen are Blue Affiliates.[79] This equates to coverage of approximately one-third of all Americans and partnerships with over ninety-six percent of hospitals and ninety-one percent of professional providers.[80] The complaint alleges that, despite these numbers, if the restrictions imposed by BCBSA (restrictions created by and imposed upon

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[73] Subscriber Complaint at ¶ 333 (alterations omitted).
[74] *Id.* at ¶ 337.
[75] *Id.* at ¶ 338.
[76] *Id.* at ¶¶ 341-42.
[77] *Id.* at ¶ 344.
[78] *Id.* at ¶ 345 (internal quotations omitted).
[79] *Id.* at ¶ 346.
[80] *Id.*

the affiliates themselves) were removed, these companies would compete between themselves on the open market.[81] The agreements made between these allegedly independent companies therefore restrains competition in a horizontal agreement by the Blue affiliates themselves.[82]

As mentioned above, the complaint alleges that these horizontal agreements between the affiliates are examples of market division for the geographic market of health insurance, a per se violation of the Sherman Act.[83] The complaint identifies that the License Agreements, Guidelines, and Membership Standards required to be a Blues affiliate prevent the affiliates from marketing themselves as such outside of designated "service areas."[84] Further, these same guidelines and agreements have caused the affiliates to limit their competition against each other when not using the Blue names.[85] This is accomplished by requiring Blue affiliates from deriving at least *eighty percent* of the annual revenue from within designated Blue service areas from the Blue trademark, and at least *two-thirds* of the revenue generated annually from either inside a Blue service area or outside must be attributed to the Blue trademark.[86] This means that, per the license agreement, affiliates must limit their non-Blue affiliated business and market share even when operating outside of service areas where the affiliates carry the Blue trademark.[87] The complaint alleges that, because the affiliates themselves created the membership requirements including the market share requirements, the independent affiliates have agreed with competitors to limit competition among themselves when operating outside of the service areas an affiliate is carrying the Blue brand.[88] As

[81] *Id.*
[82] *Id.* at ¶ 349.
[83] *Id.* at ¶ 350. *See also supra* § III.A.
[84] Subscriber Complaint at ¶ 351.
[85] *Id.* at ¶ 352.
[86] *Id.* at ¶¶ 352-53.
[87] *Id.* at ¶ 353.
[88] *Id.* at ¶ 355.

such, the plaintiffs allege that this is an agreement by and between "competitors to divide and allocate geographic markets, and therefore are per se violations of Section 1 of the Sherman Act."[89]

The complaint next alleges that in addition to the market division committed by the Blues affiliates, the rules of the BCBSA plans also include provisions which "restrict the ability of non-members of BCBSA to acquire or obtain control over any member plan."[90] There are a number of hurdles a non-Blues affiliate must jump over in order to acquire any current Blues-affiliate, starting with receiving the approval of BCBSA itself.[91] This is because a non-member must be approved by BCBSA in order to become a member plan, so the other plans would be able to block the new membership by majority vote.[92] The other set of hurdles falls in the acquisition restrictions placed on the for-profit affiliates (those who would be capable of having shares acquired), meaning a member plan's license will automatically terminate:

> "(1) if any institutional investor become beneficially entitled to ten percent or more of the voting power of the member plan; (2) if any non-institutional investor become beneficially entitled to five percent or more of the voting power of the member plan; (3) if any person become beneficially entitled to twenty percent or more of the member plan's then-outstanding common stock or equity securities; or (4) if the member plan conveys, assigns, transfers, or sells substantially all of its assets to any person, or consolidates or merges with or into any person, other than a merger in which the member plan is the surviving entity and in which, immediately after the merger, no institutional investor is beneficially entitled to ten percent or more of the voting power, no non-institutional investor is beneficially entitled to five percent or more of the voting power, and no person is beneficially entitled to twenty percent o[r] more of the then-outstanding common stock or equity securities."[93]

In short, the only way in which an acquisition involving a Blue-affiliate and a non-member company will be accomplished without the immediate termination and need for reapplication of

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[89] *Id.* at ¶ 356.
[90] *Id.* at ¶ 368.
[91] *Id.* at ¶ 369.
[92] *Id.*
[93] *Id.* at ¶ 370.

membership by BCBSA, or by prior approval by BCBSA, would be if that Blue-affiliate was the acquiring company, and not the acquired company. The complaint claims that this has limited non-member insurance plans from being able to expand business and compete against the affiliates individually.[94] It also is an incredibly high barrier to entry into the Blue market that blocks out most competitors within geographic regions. This, in turn, has raised the cost that competitors incur when expanding networks and areas of practice, reduces efficiency, and protects the Blue affiliates from competition, resulting in higher premiums to the customers.[95]

The final major allegation made in the complaint pertains to Blue affiliates' continued use of MFNs within their reimbursement agreements.[96] As was alleged by the government in US v. Blue Cross Blue Shield of Michigan, the plaintiffs claim that the MFNs reduce competition at the expense of BCBSA's customers.[97] Generally, an MFN establishes a market provider who receives the lowest prices charged, removing any incentives for the Blues affiliates to reduce overhead prices.[98] These MFNs also prevent any competitors in the region from achieving the same low costs as the Blues, making it costly to switch insurance providers and substantially limiting BCBSA's competition.[99] The MFNs also raise any potential barriers to entry within markets that will prevent competitors from wanting to enter into the markets that BCBSA affiliates have MFNs within their agreements.[100] The plaintiffs claim that, where MFNs have not outright been banned by states like Michigan, BCBSA companies utilize MFNs and "where an MFN has overall exclusionary effect on competition and entrenches market power, it could be actionable."[101]

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[94] *Id.* at ¶ 371.
[95] *Id.* at ¶ 373.
[96] *Id.* at ¶ 387.
[97] *Id.* at ¶ 389.
[98] *Id.*
[99] *Id.* at ¶ 390.
[100] *Id.* at ¶ 393.
[101] *Id.* at ¶ 395 (internal quotes and changes omitted).

All of these provisions and agreements, collectively, have caused plaintiffs to allege that Defendants were able "to acquire and maintain grossly disproportionate market shares for health insurance products in their respective regions, where these [p]lans enjoy market and monopoly power."[102] In turn, the conduct has resulted in higher premiums for enrollees which would not have been possible but for the anticompetitive conduct of the Blues affiliates.[103] In addition to monetary damages, the plaintiffs requested relief in the form of an injunction preventing BCBSA and the plan members from continuing these agreements that restrict territories.[104]

B. What Transpired and How The Parties Settled

In the years following the filing of the complaint, the case continued through the litigation process, with the plaintiffs' claims surviving challenges from BCBSA.[105] Finally, after over five years of litigation, April 2018 saw a major victory for the plaintiffs, as opposed to merely just surviving to litigate another day.[106] This was because a District Court judge ruled that BCBSA's supposed practice of market allocation constituted a per se violation of the Sherman Act, and would therefore be subject to the highest level of judicial scrutiny.[107] Because of this ruling, BCBSA would have been barred from utilizing evidence of benefits of their actions as a defense, and therefore putting the plaintiffs in a position to only have to prove BCBSA's liability through their

[102] *Id.* at ¶ 8.
[103] *Id.* at ¶ 9.
[104] *Id.* at ¶ p. 305.
[105] Docket, *supra* note 71.
[106] Amy Y. Gu, Final Settlement of BCBS Antitrust Class Action Hopes to Increase Competition Among Insurers, THE SOURCE ON HEALTHCARE PRICE & COMPETITION BLOG (Aug. 15, 2022), https://sourceonhealthcare.org/final-settlement-of-bcbs-antitrust-class-action-hopes-to-increase-competition/.
[107] *In re: Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241 (N.D. Ala. 2018).

conduct alone.[108] In a single sentence, the Eleventh Circuit upheld this decision upon interlocutory appeal, thus providing the motivation of BCBSA to settle the matter out of court.[109]

Following the decision from the Eleventh Circuit, settlement talks were quickly entered into by the parties, and the settlement received preliminary approval in December 2020.[110] Finally, after almost a decade of litigation, U.S. District Court Judge R. David Proctor of the Northern District of Alabama gave final approval to the settlement on August 9, 2022. This settlement marks a significant win for the plaintiffs, as BCBSA agreed to pay $2.67 billion in compensation.[111] Of this number, $627 million were allocated for attorneys' fees, which make up over twenty-three percent of the settlement fund.[112]

In addition to the significant financial compensation agreed to, BCBSA, its affiliates, and the plaintiffs agreed to certain forms of injunctive relief. Specifically, BCBSA agreed to drop two rules for its affiliates. First, BCBSA agreed to remove the rule that requires Blue affiliates to maintain at least two-thirds of their national net revenue from the Blue trademark.[113] This means that the Blue affiliates that have national brand recognition outside of their Blue branding can expand their business into non-Blue territories without being concerned about having too much non-Blue-revenue to retain their licenses.[114] The second rule that is set to be removed required national employers from working only with the Blue affiliate that offers coverage where that

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[108] Gu, Final Settlement of BCBS Antitrust Class Action Hopes to Increase Competition Among Insurers, *supra* note 106.
[109] *In re: Blue Cross Blue Shield Antitrust Litig.*, No. 18-90020-E, 2018 WL 7152887 (11th Cir. Dec. 12, 2018).
[110] Gu, Final Settlement of BCBS Antitrust Class Action Hopes to Increase Competition Among Insurers, *supra* note 106.
[111] *Id.*
[112] Susan Morse, *BCBS $2.7 billion settlement receives final approval*, HEALTHCARE FINANCE (Aug. 11, 2022), https://www.healthcarefinancenews.com/news/bcbs-27-billion-settlement-receives-final-approval#:~:text=The%20judge%20has%20awarded%20legal,23.47%25%20of%20the%20settlement%20fund.&text=A%20long%2Drunning%20%242.7%20billion,been%20finalized%20in%20federal%20court..
[113] Gu, Final Settlement of BCBS Antitrust Class Action Hopes to Increase Competition Among Insurers, *supra* note 106.
[114] *Id.*

employer's headquarters are located.[115] By removing this rule, Blue affiliates will now be able to compete with each other for large contracts with national employers.[116] Despite the second rule having not been mentioned in the complaint, the belief is that these rule changes will benefit both the subscriber plaintiffs as well as larger Blue companies who may now be able to compete for national accounts.[117]

The settlement is not perfect though, as many of the provisions that led to the filing of the complaint are not a part of it. The largest hole in the settlement is the agreement's failure to address BCBSA's licensing setup.[118] Because that provision has been left out of the settlement, the Blues affiliates are still able to hold the exclusive license to the Blue trademark within the specified geographic territories.[119] This means that competition will still be suppressed by Blue affiliates who either refuse to operate in territories they do not have a Blue trademark, or they do not have the brand recognition required to operate without the Blue trademark.[120]

The failure to address the licensing practices within the settlement drew an objection from Home Depot, a national employer who contracted BCBSA to insure their employees and were members of one of the plaintiff classes.[121] The reasons suggested for not solving these lasting issues in the current appeal likely have to do with the want to avoid any additional litigation by both sides.[122] Given the scope of these claims, it's possible that this could have taken years before the issue was settled, either through the courts or through settlement.[123] However, barring formal

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[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*

appeals, the settlement was set to take effect thirty days following its final approval, with the Judge noting that BCBSA will be closely monitored for their compliance with both the settlement and antitrust laws in general.[124]

C. If A Settlement Was Approved, Why Is This Still Ongoing?

In most circumstances, the filing of an approved final settlement would be the end of litigation and the beginning of compliance on behalf of the settling parties. That is not the case here, as the litigation is still ongoing. As is common in many class action suits, the proceedings have been held up by appeals. On September 7, 2022, some subclass objectors filed an appeal that has prevented the approved final settlement from entering into effect.[125] Three additional appeals followed suit, resulting in a total of four appeals that have put the enforcement of the settlement at a standstill.[126]

Of the four appeals, three focused on aspects that are related to the procedures that led to the settlement.[127] The fourth appeal is different, as it focuses more on the substance of the settlement. Similar to Home Depot's objection to the settlement before it was finalized, the final appeal to the settlement is for improper injunctive relief, as well as the lack of perpetual rights which bar individual class members from seeking further relief for antitrust claims and competitive restraints in the future.[128] This means that any members of the class are barred from suing to enjoin BCBSA from any practices that are not currently encompassed by the settlement unless they opt

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[124] *Id.*
[125] Notice of Appeal, *In re: Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, MDL No. 2406 (N.D. Ala. Sept. 7, 2022).
[126] Amy Y. Gu, Major Insurers See Antitrust Enforcement Action Headed to Appeals, THE SOURCE ON HEALTHCARE PRICE & COMPETITION BLOG (Jan. 17, 2023), https://sourceonhealthcare.org/major-insurers-see-antitrust-enforcement-action-headed-to-appeals/.
[127] *Id.* (These appeals alleged there was inadequate representation in the terms of the settlement, unequal distribution of the funds for the class members, and the amount of attorney fees.)
[128] *Id.*

out of the settlement.[129] This includes the licensing practices that are still claimed to be anticompetitive.[130]

State regulators also have their own issues with the finalized settlement agreement. The Department of Insurance of Oklahoma, on behalf of eleven additional states' Departments of Insurance, filed an amicus brief shortly after the appellant briefs were filed in December.[131] The amicus brief took aim at some of the language used within the opinion supporting the final settlement.[132] Specifically, the regulators disagreed with a statement within the settlement opinion that self-funded plans "did not buy insurance from the Blues."[133] Those who purchase self-funded plans are only purchasing administrative services from BCBS.[134] The issue with this definition is that it would risk placing stop-loss insurance outside of state regulatory oversight, and thus remove any state regulatory oversight into these plans due to ERISA preemption.[135]

The final reason that the case is still ongoing is because the subscriber complaint is not the sole class action that BCBSA has been dealing with over the past decade. There was a parallel complaint, filed by network providers at the same time as the initial complaint.[136] The provider complaint alleges much of the same conduct as the subscriber complaint, however it argues as to why it harms the providers as opposed to the subscribers.[137] Specifically, the limited competition due to the horizontal agreements allegedly made by BCBSA limited the payments that were made

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[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* (internal quotes omitted).
[134] *Id.*
[135] *Id.*
[136] Corrected Consolidated Second Amended Provider Complaint, *In re: Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, MDL No. 2406 (N.D. Ala. Nov. 25, 2014).
[137] *Id.* at ¶¶ 1-10.

to doctors and other providers.[138] Unlike the subscribers, the providers have not yet settled their complaint, and the litigation is still ongoing.[139] As such, even if the injunctive relief sought in the appeals is not secured, the plaintiffs have one final hope in the form of the provider action.

V. What Happens Next?

Making an educated guess, what is likely to come from these objections is that the settlement will go through. It is possible the provision precluding current class members from filing individual suits in the future is waived or altered in some way to allow for subsequent action down the line. However, as the settlement is meant to be a final judgment, this is an unlikely outcome based off the nature of the legal system.[140] Namely, the appellate court may view class members as having the option to opt out of the settlement so as not to be bound as an adequate way of avoiding that provision. This is likely the reason behind the high monetary damages, to entice class members to be bound by the judgment. Thus, the only way for class members to pursue further injunctive relief individually will be to opt out of the settlement class altogether. Otherwise, it will be solely up to the government or non-class members to police BCBSA and seek relief for any continued anticompetitive harm that may result from BCBSA's operations.

While the provider action is still ongoing, the end to the subscriber action will allow BCBSA to focus their full attention and resources towards that. It is likely this issue will settle eventually as well, in part due to both sides no longer wanting to draw out an otherwise lengthy and expensive litigation. While it is possible for the providers to get further injunctive relief, the

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[138] Amy Y. Gu, Final Settlement of BCBS Antitrust Class Action Hopes to Increase Competition Among Insurers, THE SOURCE ON HEALTHCARE PRICE & COMPETITION BLOG (Aug. 15, 2022), https://sourceonhealthcare.org/final-settlement-of-bcbs-antitrust-class-action-hopes-to-increase-competition/.
[139] *Id.*
[140] *See* Final Order & Judgment Granting Approval of Subscriber Class Action & Appointing Settlement Administrator, *In re: Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, MDL No. 2406 (N.D. Ala. Aug. 9, 2022).

longer this goes on for, the more likely it is the providers will fail to get all the relief they are seeking, like what happened with the subscribers. Because of this, it is likely that the providers will end up with a similar settlement as the subscribers: high monetary settlement, minimal injunctive relief that does not change how the BCBSA's licensing system operates and precludes members of the provider class from bringing subsequent action.

It is impossible to predict the future with perfect accuracy. However, despite that, it is possible to analyze history, and analyze what we know to make the most accurate prediction possible as to how this settlement will impact BCBSA's future actions and how the settlement will impact the health insurance marketplace. Even should this prediction not come to pass, a look at potential policy changes that can be made over coming years may help to see how else we as a community can achieve what the plaintiffs of this lawsuit had hoped to achieve.

A. Will The Current Settlement Have the Desired Impact on Competition?

Should the appeals fail, and the settlement remains as is, there will be an impact on competition. However, just because there is an impact on competition, that does not mean that it is the desired impact of increasing competition in the marketplace, specifically among the Blue affiliates. There will likely be a short-term increase in competition between the Blue affiliates, but even while abiding by the settlement terms, this increase competition is unlikely to last in the long term.

As mentioned above, many experts are of the opinion that the rule changes will, generally, be most advantageous towards the larger Blue companies (e.g. Anthem, Highmark, Wellpoint).[141] These large companies will thrive without the restraint of having to maintain a certain amount of

[141] *See supra* § IV.B.; Gu, Final Settlement of BCBS Antitrust Class Action Hopes to Increase Competition Among Insurers, *supra* note 138.

Blue branded business. The larger companies have a recognizable brand, even without the Blue trademark, such that they will be able to successfully move into territories they were previously unwilling due to the risk to their licenses. Even more, they will be able to freely acquire non-Blue companies without any concerns as to the acquired company's business pushing them over the requisite threshold.[142]

The concern arises, however, as to how the smaller Blue companies will fare in this new environment. These companies do not have the same brand recognition as a larger company such as Anthem. Many Blue companies operate in just one state, as opposed to Anthem's fourteen state reach.[143] In a market where these larger Blue companies are now able to freely enter into territories they do not have the Blue license and compete with the smaller Blue Affiliates, there will be competition, but the big fish may win. And what happens when the smaller Blue Affiliate is no longer profitable and looks to be acquired? The larger Blue affiliates can either acquire the smaller Blue company, and take the license for themselves. Or the smaller Blue company can be acquired by a non-Blue company who will need to be approved (by the other Blue companies themselves) and, if that does not happen, the larger Blue affiliate can get the license that is forfeited per the licensing terms.

Without an alteration of the licensing terms as was sought by the plaintiffs (and not negotiated within the settlement), the increase in competition is set to be short-term at best, to the benefit of the larger Blue affiliate companies. An inability to approve more than one or two licenses per region will make it difficult to increase the competition within regions, specifically by the

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[142] *See id.* (discussing Anthem's failed merger with Cigna due, in part, to the legal issues with the BCBSA and Cigna's non-Blue branded business)

[143] Anne Wilde Matthews, *Antitrust Lawsuits Target Blue Cross and Blue Shield*, THE WALL STREET JOURNAL (May 27, 2015 5:06 pm), https://www.wsj.com/articles/antitrust-lawsuits-target-blue-cross-and-blue-shield-1432750106.

smaller Blues. The smaller Blue affiliates who remain in only one or two regions will be unlikely to leave those regions to compete elsewhere unless they have the brand recognition that comes from a Blue license. For this reason, the bigger companies with brand recognition are clearly at an advantage. Further, the restrictions within the licensing agreements around mergers will continue make it difficult for non-Blue affiliates to enter the Blue market by acquiring these smaller companies. Instead, the larger Blues will be able to expand their Blue licensing when the smaller Blues inevitably are forced out of the market by the competition they will be facing from the larger Blues. In the end, this means that for all the competition that is likely to occur, it will be short-lived, as the larger Blues will be at a clear advantage. However, in a perfect world, some policy changes, either by the government or by BCBSA themselves, may be able to alter how the Blues operate and increase competition as sought.

B. What Can Be Done? Policy Considerations That May Increase Competition

To operate in a world with free competition was the purpose sought by Congress back when they first created the Sherman Act.[144] With the recent amendments to the insurance market exemptions that have prevented the federal government from imposing liability for antitrust violations, the government should now be able to step in and trust bust within the insurance market.[145] For instances in which the federal government does not step in, the states have and can continue to make certain policy changes through legislation as they've done in the past. Given that BCBSA in the past has not changed its policies when faced with pushback on antitrust grounds unless forced to by legislation or a court order, they likely still will not enact policy changes on

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[144] *Sherman Anti-Trust Act (1890)*, NATIONAL ARCHIVES, https://www.archives.gov/milestone-documents/sherman-anti-trust-act (last visited Apr. 11, 2023).
[145] Lisl J. Dunlop, *Repeal of Antitrust Immunity for Insurers, What Does It Mean?*, MANATT, PHELPS & PHILLIPS, LLP (Mar. 23, 2017), https://www.manatt.com/insights/newsletters/antitrust-law/repeal-of-antitrust-immunity-for-insurers-what-do.

their own accord. However, even if the government does not act, maybe BCBSA will enact some of these policy changes themselves.

A lot can likely be done to reformulate the licensing provisions such that they would increase competition within the healthcare market. As the provisions are currently written, even with the requirements removed from the settlement, competition between the Blue affiliates is likely to be stifled due to the bigger affiliates being able to encroach on the territory of the smaller, individual affiliates. As has been discussed, while this is likely to increase competition in the short-term, eventually the larger affiliates will outlast the smaller ones. The issues here can be attributed to two requirements: the exclusivity of a blue license within a given territory, and BCBSA (aka the affiliates themselves) being the ones who approve who can receive a license.

The best way to solve the competition issues at hand would be for the government to challenge these provisions within the BCSBA licensing agreements, and either require the government to change the agreements, or entice BCBSA themselves to do so. The best recommended change would be simple: make the BCBSA licenses non-exclusive. How that can be achieved can be accomplished several ways. The first way would be to simply remove the exclusivity provision of the license and allow multiple Blues affiliates to operate with a Blue license in a given territory. However, similar problems to the ones to be expected with the current settlement will likely arise, namely that the larger Blue affiliates will overtake the market share of the smaller affiliates and force the smaller affiliates out of the marketplace. If the government were to set up marketplace protections for the smaller affiliates, especially those who are not for profit affiliates, then the competition between the Blue affiliates as well as in the general marketplace can be protected. This would be a simple policy, of government protection for the smaller fish in the Blue pond, that would enable competition even with the current settlement.

A more competition-friendly policy to enact can be found by removing the voting and approval requirement as well. If approval process was not one that is achieved through the votes of the BCBSA, and instead was a set list of requirements an insurance company must achieve in order to achieve and maintain a license, then that should encourage competition fully on the marketplace, not just the current Blue affiliates. One of the BCBSA's main reasons for maintaining the trademark exclusivity among regions is because of the recognition that the Blue branding brings to its affiliates a sense of quality.[146] If the requirements, which could be set out by the members of the BCBSA each year to ensure compliance and continued innovation, were viewed almost as a seal of approval, not easy to get and maintain but for a high quality insurance provider, then those concerns can still be addressed. In addition, having this form of Blue branding will allow other companies in the marketplace to achieve the Blue branding, in short creating efficient competition between the Blue companies such that they are competing with each other and keeping prices to a minimum.

To operate along the path of transitioning the BCBSA licenses to seals of approval within the health insurance marketplace can also be a way of fixing the next licensing provision at issue in the complaint: the automatic forfeiture of a Blue license when a Blue affiliate is acquired by a non-Blue approved company. If a BCBSA license is considered a seal of approval and is non-exclusive among territories, then suddenly this provision is not an issue, as there would be an increase in companies that are affiliated with the Blue branding. As such, more companies would then be able to compete to acquire the Blue affiliate without concern on any end of forfeiture of a license. In addition, if a non-Blue branded company wants to acquire the affiliate, it makes sense

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[146] William Bednar & Stephanie Entzminger, *History of Competition Between "Blues" Health Plans and a Recent Antitrust Settlement*, AXENE HEALTH PARTNERS, LLC, https://axenehp.com/history-competition-blues-health-plans-recent-anti-trust-settlement/ (last visited Apr. 11, 2023).

why that license would be forfeited: either the acquiring company does not want the license or has not met the requirements necessary to acquire the license. This should continue to maintain competition in the market, as well as increase the competition for affiliates who are seeking to be acquired.

The final provision that was not provided injunctive relief in the settlement is the issue the subscribers took with the MFNs within some of the partnerships with hospitals. It is possible that of all the provisions that will be solved by the provider's action, it would be this provision. Should that not be the case, what can be done about the MFNs within the policies? As of August 2020, twenty states had some form of restrictions pertaining to MFNs within healthcare contracts.[147] While there has been no formal link or court holding that has found MFNs to have an anticompetitive effect on the marketplace, it is likely that that is where the US v. Blue Cross Blue Shield of Michigan case was heading before it was rendered moot by Michigan's legislative actions.[148]

Studies have shown that bans on MFNs reduce hospital price growth in geographic areas with highly concentrated insurer markets.[149] As such, the proposed solution is simple: continue banning and restricting MFN clauses through legislative action. If the remaining thirty states who have not taken action against MFNs were to restrict them in some capacity, then BCBSA will have no option but to adhere to the legislative guidance from state to state. While leaving this solution up to the states poses the risk of nonadherence to the policy, it is the best method of gaining lower and fairer prices for insureds across the marketplace.

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[147] Daniel R. Arnold et al., *Do State Bans of Most-Favored Nation Contract Clauses Restrain Price Growth? Evidence From Hospital Prices*, THE MILBANK QUARTERLY (May 10, 2022), https://doi.org/10.1111/1468-0009.12568.
[148] Stipulated Motion, *supra* note 66.
[149] Arnold, *supra* note 147.

VI. Conclusion

These policies are merely suggestions as to ways to bolster competition within the insurance market, in response to much of the claims made by the plaintiffs in this case. At the end of the day, none of them are perfect solutions to an otherwise oversized problem. The reason that the litigation lasted as long as it did prior to settlement is because BCBSA has found ways to game the system such that they've created many anticompetitive policies for the marketplace. Their reach is widespread, so the potential solutions will need to be widespread as well. The settlement negotiated by BCBSA was made to look as if progress was made, but to minimize the impact it has on their business. As such, the best expectation is to see short term competition stifled by a long-term return to form. Until more drastic policy changes against BCBSA as suggested here are enacted, that is what we should expect to see.